IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1022

ARTHUR KRAUSE, *et al.*,
Cross-Petitioners,

v.

JAMES A. RHODES, *et al.*,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION FOR CROSS-RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly determined that plaintiffs enjoyed no First Amendment right to engage in a group demonstration, because the evidence "was uncontradicted that similar group meetings * * * during the preceding three days had resulted in wide-spread violence and property damage".

COUNTERSTATEMENT OF THE CASE

The opinion of the Court of Appeals sets forth the facts relevant to the Plaintiffs' First Amendment claims:

> "* * * In opening statements to the jury and in colloquy with the District Court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2 and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard 'because of the violence which had occurred, because it was unexcusable [sic], unjustifiable . . . .' It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period." (Cross-Petition, page 12a).

The "factual history" contained in plaintiffs' Conditional Cross-Petition contains no challenge to the Court of Appeals' description of the events leading up to the May 4 noon assembly. Instead, plaintiffs rely upon the Matson-Frisina communication, and "contend this ban was an unjustified, overbroad prior restraint on protected First Amendment political expression in a wholly proper place, at a wholly proper time for such activity" (Cross-Petition, page 29).

Plaintiffs exaggerate considerably in characterizing the Matson-Frisina communication as a "regulation".[1] In any event, plaintiffs failed to establish that this document was the cause of any of their injuries. There is no evidence that the decision to prohibit the May 4 assembly was based thereon or was the continuation of a previously instituted ban. On the contrary, the record shows that it was a consensus opinion of those officials present at the 10:00 a.m. May 4th meeting that this particular assembly should not be permitted, based on their experience with prior assemblies and the resulting violence.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals held that defendants satisfied the "heavy burden" of justifying their decision to permit no assemblies on the Kent State campus on May 4, 1970. In so doing, the Court of Appeals applied the correct and most liberal standard as articulated in *Healy* v. *James*, 408 U.S. 169, and the conclusion that that standard was satisfied was clearly correct. Petitioners' contention—"that the authorities had no right to ban or disperse the May 4 assembly in advance even though it was uncontradicted that similar group meetings in Kent, Ohio and on the campus of Kent State during the preceding days had resulted in widespread violence and property damage" (Cross-Petition, page 13a)—would be too insubstantial to warrant this Court's attention even as a matter of first

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[1] Plaintiffs contend that the Matson-Frisina communication is "the regulation promulgated by the Governor of Ohio, the Ohio National Guard and Kent State University officials. (Cross-Petition, page 5). Plaintiffs' own recitation of facts clearly shows that the letter was drafted by Robert Matson, Kent State Vice President for Student Affairs, on May 3, 1970, after Governor Rhodes left the City of Kent. Matson labeled his letter "a special message to the University community". There is no evidence that any of the defendants authorized or ordered the letter to be prepared, participated in drafting the letter, or approved or reviewed the letter.

impression. But the contention is not novel. A like First Amendment argument was made and rejected in *Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U.S. 287:

> "The question which thus emerges, is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.
>
> The starting point is Thornhill's Case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for 'publicizing, without annoyance or threat of any kind, the facts of a labor dispute.' 310 U.S. 100. * * * The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the working-man's means of communication.
>
> It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert

> force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." 312 U.S. at 292-293.

So here, in considering whether to permit a campus assembly of students, the responsible authorities were entitled--indeed compelled—to consider that similar rallies in the past three days had led to "disturbances in the City of Kent and the burning, by a few people, of the ROTC Building on campus". (Cross-Petition, page 29). Under *Meadowmoor*, and as a matter of elementary common sense, the First Amendment did not require the defendants to risk further injury to persons or property by permitting another assembly so "enmeshed with contemporaneously violent conduct", 312 U.S. at 292.

2. Tacitly recognizing that their attack on the Court of Appeals' reasoning cannot be successfully maintained, plaintiffs advance a new argument—that the Matson-Frisina communication was an unconstitutionally overbroad infringement on their right of peaceable assembly. But this argument was not presented in plaintiffs' appeal to the Court of Appeals. What was said last Term in *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34, is therefore very much in point:

> "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it."

See also, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 146, n.2 and cases cited *id.*; *United States* v. *Ortiz*, 422 U.S. 891, 898.

There are two additional reasons why there is no genuine "overbreadth" issue before the Court. First, plaintiffs have failed to establish that the Matson-Frisina communication was a cause of the injuries they suffered. On the contrary, as we observed in the Counterstatement, the evidence shows that the decision to ban the May 4 rally was reached independently of that communication or of any general policy; it was a decision pertaining to this particular rally, based on the situation as it then appeared. Under ordinary principles of tort law, plaintiffs cannot recover for injuries which were not proximately caused by the assertedly unconstitutional communication.

Second, contrary to plaintiffs' label, the Matson-Frisina communication on which this argument rests is not a "regulation" (Cross-Petition, page 5), and there is no evidence that it was prepared or even authorized by any of the defendants. See p. 3, *supra*. In any event, it was limited by its own terms to the campus and City of Kent and to the period of emergency; thus tailored to the same situation which justified the ban of the May 4 assembly, it was, therefore, not "overbroad". Plaintiffs take the Court of Appeals to task for failing to answer the question, "was the restraint the only alternative, or was a narrower restraint possible?" (Cross-Petition, page 32). Yet, plaintiffs even now fail to formulate a "narrower restraint" which would have satisfied what they take to be the constitutional requirements, but yet would not have risked further "violence and vandalism." (Cross-Petition, page 12a).

CONCLUSION

For the above reasons, the plaintiffs' Conditional Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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